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In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DAVIDSON, PETITIONER

v.

JOSEPH CANNON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether petitioner was deprived of liberty without due process of law when state officials' negligence resulted in an injury to his person and state law bars a tort action against either the officials or the state.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the liability under 42 U.S.C. 1983 of individual state officials whose allegedly negligent acts injured a state prisoner in a jurisdiction that bars the prisoner from bringing a tort action against either the state itself or the officials. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials may be held liable in many of the same circumstances in which state officials are liable under Section 1983. In addition, the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, precludes tort actions against the government for certain tortious acts by government employees. Since the Court's decision may affect the extent to which federal officials may be held

personally liable for acts committed in the course of their employment, the United States has a clear interest in this case.

STATEMENT

1. Petitioner was an inmate at the New Jersey State Prison at Leesburg. On December 19, 1980, he sent a note to respondent Cannon, the assistant superintendent of the prison, in which he said that another inmate, McMillian, had threatened to harm petitioner. Cannon read the note and referred it to respondent James, a Corrections Sergeant. Cannon subsequently testified that he did not regard the situation as urgent because he knew petitioner personally and on previous occasions when petitioner had a serious problem he had contacted Cannon directly. J.A. 98-99, 120.

James received the note at approximately 2:00 p.m. He did not read it but left it on his desk while he attended to other matters—for example, a report that an inmate had a knife in his cell and a problem with an inmate who appeared to be having a mental breakdown. J.A. 99. When James left the institution at 10:30 p.m., he forgot the note. Neither Cannon nor James worked on December 20 or 21; on December 21, McMillian attacked petitioner with a fork, breaking his nose and inflicting other wounds. Petitioner took no steps, other than writing the note, to alert the authorities that he feared an attack; he testified that he did not foresee the attack but wrote the note to exonerate himself in case McMillian started a fight. *Ibid.*

2. Petitioner sued respondents under 42 U.S.C. 1983 in the United States District Court for the District of New Jersey. Petitioner claimed that respondents were liable in damages because they deprived him of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. After a trial, the district court ruled that "the assault here implicates a 'liberty interest' protected by the due process clause"

because "[f]reedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty" (J.A. 89).

The district court then turned to the question whether respondents could be said to have "deprived" petitioner of this liberty interest within the meaning of the Due Process Clause. The court found that respondents "did not act with deliberate or callous indifference to [petitioner's] needs" (J.A. 89). But the court also found that respondents "negligently failed to take reasonable steps to protect [petitioner], and that he was injured as a result" (*ibid.*). The district court ruled that under this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), "a state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." J.A. 91.

The district court noted that New Jersey law provides that "[n]either a public entity nor a public employee is liable for * * * any injury caused by * * * a prisoner to any other prisoner." N.J. Stat. Ann. § 59.5-2(b)(4) (West 1982). The court concluded that since "New Jersey provides [petitioner] no process whatsoever by which to pursue a remedy against the state or state officials" (J.A. 91-92), it cannot be said to have provided the process that is "due" under the Fourteenth Amendment.[1] The district court therefore concluded that in view of petitioner's physical injuries, "an award of $2,000.00 in compensatory damages is an appropriate judgment" (J.A. 93) and it entered judgment in that amount against respondents.

3. The court of appeals, hearing the case en banc, reversed. The court of appeals ruled that the district

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[1] The district court also rejected respondents' argument that petitioner's claim was barred by qualified immunity. The court did not dispute that respondents might have been unaware that they could be held liable under Section 1983 for negligent action, but it reasoned that such unawareness "obviously could not have influenced their actions" because "negligence is by its nature unintentional" (J.A. 93).

court was not clearly erroneous in finding that respondents were negligent (J.A. 102). The court of appeals also concluded that the attack on petitioner implicated a liberty interest protected by the Due Process Clause (*id.* at 102-105).

The court of appeals did not agree, however, with the district court's conclusion that respondents' negligent action constituted a "deprivation" within the meaning of the Due Process Clause. The court of appeals first reviewed a series of this Court's decisions—*Monroe* v. *Pape*, 365 U.S. 167 (1961); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Paul* v. *Davis*, 424 U.S. 693 (1976); *Screws* v. *United States*, 325 U.S. 91 (1945); *Procunier* v. *Navarette*, 434 U.S. 555 (1978); and *Baker* v. *McCollan*, 443 U.S. 137 (1979)—and concluded that "nothing in th[is] Court's cases through 1979 provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit." J.A. 111.

The court of appeals then considered *Parratt* v. *Taylor*, *supra*. The court acknowledged that certain "language [in *Parratt*] standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed in a § 1983 action" (J.A. 113). But the court of appeals stated that "in the context of the development of the law" that it previously had discussed, "we conclude [that] *Parratt* does not so hold" (*ibid.*). The court of appeals reasoned that *Parratt* could not have been intended to overturn this Court's prior decisions that "vigorously rejected the suggestion that traditional torts bec[o]me constitutional violations when committed by state officials" (J.A. 113). While the court of appeals "eschew[ed] prescribing a comprehensive litmus test to determine which actions are or are not within § 1983" (*id.* at 116), it noted that "[t]he essential element of a § 1983 action is abuse by a state official of his or her

official position" (*id.* at 115) and concluded that Section 1983 "does not extend to providing a remedy for the type of negligence found in this case" (*id.* at 120; footnote omitted). The court of appeals accordingly ruled that petitioner had failed to make out a violation of either his procedural or his substantive due process rights (see *id.* at 120, 121-122).

Judges Garth and Weis joined the opinion of the court of appeals but emphasized in a concurring opinion that "even if mere negligence could constitute a deprivation of [petitioner's] liberty interest * * *, there is no requirement or reason that a remedy must be provided by [Section] 1983 in federal court. * * * Just because no remedy is available to [petitioner] under state law, it does not follow that *some* remedy must be made available *somewhere*" (J.A. 123 (emphasis in original)). The concurring opinion remarked that "an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials" from a tort action arising out of a claim like petitioner's "outweighs [petitioner's] interest in having available a monetary cause of action against prison officials for merely negligent conduct" (*id.* at 124). Judges Garth and Weis concluded that because of "the state's strong interest in protecting its prison officials from liability, * * * the balance [must be] struck in favor of the state" (*id.* at 126).

Judge Seitz dissented on the ground that language in this Court's opinion in *Parratt* precluded the court of appeals from holding that negligent action does not constitute a deprivation within the meaning of the Due Process Clause (J.A. 127-132). But Judge Seitz noted that Justice Powell's concurring opinion in *Parratt* had urged that a negligent action could not constitute a deprivation, and he stated that "there is much to be said for Justice Powell's opinion, which 'would avoid trivializing the right of action provided in § 1983'" (*id.* at 131 (quoting 451 U.S. at 549)). Judge Gibbons

also dissented (J.A. 132-172), contending that "no body politic calling itself humane should assert that custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm from befalling their charges" (*id.* at 133; footnote omitted). Judge Higginbotham dissented "for the substantive reasons stated in the opinions of Judges Seitz and Gibbons" (*id.* at 172).

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Petitioner's argument is straightforward. The state's negligence, he asserts, has denied him "liberty." The state also has not offered him a remedy for its wrong. Therefore, he concludes, the state has deprived him of liberty without due process. But petitioner's assertion cannot be taken at face value. Because of the extensive nature of sovereign and official immunities, individuals injured by the negligence of government employees often find themselves without a tort remedy. The Court never has suggested that such circumstances are constitutionally impermissible. Petitioner's argument thus necessarily is wrong.

1. In our view, a central flaw in petitioner's contention is its assumption that a negligent act by a state official can give rise to a constitutional "deprivation." We recognize that petitioner's assumption finds some support in language in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). But *Parratt* does not settle the issue; the Court there was focusing on the state of mind necessary to make out a violation of 42 U.S.C. 1983 (rather than of the Due Process Clause), and its brief comments on "negligent deprivations" were unnecessary to its holding that the *Parratt* plaintiff had *not* been denied due process. Moreover, it is plain that petitioner's proposition is inconsistent with the language and purposes of the Due Process Clause, and with the decisions of this Court that have defined the relationship between that Clause and the common law.

As Justice Powell noted while concurring in the result in *Parratt* (451 U.S. at 548), the term "deprivation" generally connotes an intentional act. And the Due Process Clause has, historically, been applied only to deliberate decisions by government officials that deprived persons of liberty or property. From the origin of the due process concept in the Magna Carta through this Court's most recent decisions construing the Due Process Clause, its guarantee of procedural regularity has served to protect individuals against oppressive or arbitrary misuse of government power. When a state official inflicts a negligent injury, however, the authority of government is brought to bear against the individual in a far more oblique and less threatening way; to view the Due Process Clause as a protection against such conduct is to trivialize its historic role.

2. If the Court were to accept petitioner's invitation to apply procedural due process to negligent "deprivations," it accordingly would have to undertake a radical redefinition of the purposes of the Due Process Clause. Traditionally, the Clause has guaranteed that one faced with a deprivation will receive a fair hearing, so that the state can determine whether the contemplated deprivation is justified—a purpose, of course, that presupposes knowing or systematic state conduct. But the guarantee of due process never has been held to mean that the state cannot err, or that for every wrong there must be a remedy.

Petitioner, however, envisions an entirely different role for procedural due process. He complains only that he suffered an injury that can be traced to the state's error. He argues that the Due Process Clause makes that error unconstitutional because the state has no mechanism for correcting its mistake. He therefore insists that the guarantee of procedural due process grants him a *substantive* right to recover damages for his injury. His assertion, then, is that the Due Process Clause directs the courts to fashion a federal law of torts—but to do so

interstitially, to cover fortuitous gaps in state tort law. Petitioner's contention thus runs afoul of a proposition that repeatedly has been propounded by this Court: that the Due Process Clause serves purposes distinct from the purposes of the common law of torts.

3. That petitioner's position cannot be reconciled with this Court's rulings on the role of procedural due process is not surprising: his claim, at bottom, is not a procedural one at all. Procedural claims relate, of course, to the procedures that must accompany—and that make permissible—deprivations of life, liberty, or property. But it is nonsensical to talk about petitioner's claim in those terms. A state official could not have inflicted upon petitioner the injuries that he suffered (or caused him to be so injured) on any showing under the most rigorous procedures; doing so would violate the constitutional prescriptions imposed by the Eighth Amendment or by the *substantive* component of the Due Process Clause.

Petitioner's claim therefore must be grounded on substantive due process. As such, it cannot prevail. The simple negligence he alleges plainly does not involve a deliberate infliction of serious injury of the sort that has been found to infringe on substantive constitutional guarantees. Cf. *Rochin* v. *California*, 342 U.S. 165, 172 (1952). And this conclusion points up the basic anomaly in petitioner's position. By insisting that every injury to person or property gives rise to a procedural due process claim (so long as it is not remediable in a state tort suit), he is attempting to convert a hopeless substantive claim into a live procedural one. In the process, he is distorting the meaning of the Clause as a whole.

B. Petitioner cannot prevail even if he is granted all of the dubious premises discussed above: even if he was deprived of liberty, he was not denied due process simply because the state's tort rules preclude him from obtaining a damages award for that deprivation. States have exceedingly wide latitude to fashion substantive or pro-

cedural rules of tort law, even if on occasion such rules may make it impossible for injured persons to obtain redress in damages. Determining whether these rules comport with due process requires an inquiry into the magnitude of the private interest in maintaining suit as measured against the interest served by the state provision at issue. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). And as repeated holdings by this Court demonstrate, official immunity rules have long been understood to further important public policies. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967). A procedural system that makes use of such rules therefore cannot, for that reason alone, be deemed fundamentally unfair.

ARGUMENT

I. A NEGLIGENT INFRINGEMENT OF A LIBERTY INTEREST DOES NOT CONSTITUTE A "DEPRIVATION" OF LIBERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

A. Petitioner's Argument Reads The Due Process Clause As Creating A Remedy For All Tortious Injuries

1. Petitioner's argument is straightforward and superficially alluring. His interest in freedom from personal injury is, petitioner contends, a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment. The courts below agreed that the negligence of respondents, who are state officials, caused that interest to be invaded. A negligent act that has such an effect, petitioner asserts, constitutes a "deprivation" of liberty within the meaning of the Due Process Clause. Since the state provides him no tort remedy, that deprivation, petitioner further contends, occurred without "due process of law." Therefore, petitioner concludes, his rights under the Due Process Clause of the Fourteenth Amendment have been violated.

Several of the steps of this syllogism are subject to substantial doubt. But more important, its conclusion cannot possibly be correct. If petitioner's reasoning were valid, almost any negligent tort committed by a state official acting within the scope of his authority could, depending upon the vagaries of state tort law, constitute an actionable "deprivation" of "liberty" or "property." If, for example, a government employee driving an automobile on official business negligently caused injury to the automobile and person of another, under petitioner's reasoning the injured party would have been "deprived" of both property and liberty. Yet the Court has noted the "'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin* v. *Breckinridge*, 403 U.S. 88, 101-102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). Indeed, in *Paul* the Court thought it obvious that the Due Process Clause should not be interpreted in a way that would permit "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle [to present] * * * claims cognizable under § 1983" (424 U.S. at 698); the Court in *Paul* rejected a Section 1983 claim based on the Due Process Clause in part because it saw no principled way of allowing that claim without also permitting a Section 1983 claim by any person injured by a government employee's tortious act.

2. Petitioner's answer to this anomaly in his argument is that his claim is based not only on respondents' negligence but also on New Jersey's failure to provide a tort remedy, against either the state or respondents, for that negligence. See Pet. Br. 16-17. Petitioner thus contends that the Due Process Clause is not violated by a government employee's negligence alone but *is* violated when that negligence cannot, under state law, be redressed by an action in tort. Cf. *Parratt* v. *Taylor*, 451

U.S. 527, 550-551 n.8 (1981) (Powell, J., concurring in the result). In short, petitioner suggests that, under the Due Process Clause, a remedy must be provided for every injury to person or property that ultimately may be traced to a state actor. But this contention, too, is implausible. To the contrary, in *Parratt*—the decision on which petitioner primarily relies—the Court condemned as simplistic and ahistorical the proposition that no loss should "go without redress," noting that the validity of any claim must turn on "the complex interplay of the Constitution, statutes, and the facts." 451 U.S. at 531-532.

That the Court reached such a conclusion is hardly surprising. Because of the extensive nature of sovereign and official immunities, individuals injured by the actions of government employees frequently find themselves without a tort remedy against either the employee or the government.[2] Many federal and state employees are, and long have been, wholly or qualifiedly immune from suit for acts committed in the course of their employment (including, in many cases, acts that are tortious). See, *e.g.*, *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87 (1845); *Beaty* v. *Perkins*, 6 Wend. 382 (N.Y. Sup. Ct. 1831). See also *Owen* v. *City of Independence*, 445 U.S. 622, 637-638 (1980); James, *Tort Liability of Governmental Units and Their Officers*, 22

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[2] Indeed, even apart from immunity rules, a great many statutes and common law strictures make it impossible for plaintiffs to recover for negligent injuries caused by state actors.

U. Chi. L. Rev. 610, 640-641 & nn.184-186, 644-645 (1955) (citing cases). And historically, all tort suits against state and federal governments were barred by sovereign immunity. State tort claims acts, to the extent they exist, are a recent innovation,[3] and the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, was not enacted until 1946 (Act of Aug. 2, 1946, ch. 753, Tit. IV, 60 Stat. 842 *et seq.*). Moreover, the Federal Tort Claims Act does not by any means permit all suits for negligence; it contains numerous exceptions. See 28 U.S.C. 2680. Several of these exceptions—in particular, the limitation on liability for the performance of a "discretionary function" (28 U.S.C. 2680(a))—immunize the government from suit in a wide category of cases in which individual employees also are immune.[4]

Consequently, the situation in which petitioner finds himself—he has been injured by the negligence of a government employee but, because of sovereign and official immunities, is without a tort remedy—is commonplace. To agree with petitioner that this state of affairs amounts to a violation of due process, the Court would have to question the constitutionality either of sovereign immunity or of government employees' immunities from

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[3] A study of state waivers of sovereign immunity published in 1954 concluded: "The principal fact to be noted * * * is that few states have very fully broken away from the immunity rule." Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363, 1363.

[4] See *Developments in the Law: Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 838 (1957) (footnotes omitted):

> The Federal Tort Claims Act has removed some of the immunity of the Government to suits for injuries caused by its agents, but the consent to suit in this act does not extend to harms caused through discretionary action of government officers. Since that is precisely the area in which officers are most protected by personal immunity, the result is that persons injured through wrongful discretionary action have no judicial remedy.

common law tort actions. But the suggestion that the states and the federal government are constitutionally obligated to enact tort claims statutes—indeed, to enact such statutes with no exceptions—is wholly novel. See generally *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411, 412 (1821). And the Court itself has been largely responsible for creating official immunities.

In fact, the Court never has suggested that a predicament like petitioner's is constitutionally impermissible. It has declined to recognize a federal right of action for an injured party whose tort law remedy against a state officer was foreclosed by an immunity statute. *Martinez* v. *California*, 444 U.S. 277, 282 (1980). And it has affirmed the power of states to "create substantive defenses or immunities for use in adjudication" (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982)) without suggesting that the withdrawal of certain injuries from the reach of state tort law makes them remediable in federal court. See *Martinez*, 444 U.S. at 282. Cf. *Ferri* v. *Ackerman*, 444 U.S. 193, 198 (1979). It follows that the conclusion reached by petitioner's reasoning—that the Due Process Clause is violated when state employees act negligently and no tort remedy is available—is necessarily wrong, and that at least one of the premises of petitioner's syllogism must be incorrect.

B. The Due Process Clause Is Not Directed At Negligent Acts

In our view, a central error in petitioner's argument is its assumption that a negligent act by a state official that invades a liberty or property interest constitutes a "deprivation" of such an interest within the meaning of the Due Process Clause.[5] Like the court of appeals,

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[5] Although it might plausibly be argued that no "liberty" interest is invaded by an isolated negligent act (compare *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316 (1982), and *Ingraham* v. *Wright*, 430

we recognize that petitioner's assumption finds some support in language in *Parratt* v. *Taylor*, *supra*. But petitioner is incorrect in asserting that *Parratt* definitively resolved the issue, and petitioner's contention on the merits is inconsistent with the language and purposes of the Due Process Clause and with the decisions of this Court that have defined the relationship between that Clause and the common law.

1. In *Parratt*, a state prisoner who asserted that prison officials negligently lost his property brought suit against the officials under 42 U.S.C. 1983, claiming that he had been deprived of property without due process. This Court rejected his claim, ruling that a post-deprivation tort remedy against the state was sufficient "process." In the course of reaching this conclusion, the Court remarked that "the alleged loss, even though negligently caused, amounted to a deprivation" (451 U.S. at 536-537 (footnote omitted))—the statement from which petitioner draws the bulk of his argument.

In fact, however, the Court's focus in *Parratt* was not on the Due Process Clause; it granted certiorari (as it had twice previously) to consider the separate question whether "mere negligence will support a claim for relief under [*Section*] *1983*" (451 U.S. at 532 (emphasis added)). The Court's discussion relating to the defendant's state of mind—which led to the conclusion that "*the statute* [is not directed] solely to intentional deprivations of constitutional rights" (*id.* at 534 (emphasis

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U.S. 651, 673-674 (1977)), our discussion in this brief is confined to the question whether the kind of official actions at issue here could have effected a "deprivation" within the meaning of the Due Process Clause. We therefore assume arguendo that a liberty interest was implicated by respondents' actions.

[6] This conclusion means only that Section 1983 does not add an intent requirement of its own; a plaintiff proceeding under the statute still must prove a constitutional violation, including the state of mind demanded by the provision of the Constitution at issue. Cf. *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979).

added))[6]—therefore focused entirely on the language, legislative history, and prior interpretations of Section 1983. See *id.* at 534-535, 541-542. In contrast, the Court's statement that negligence may give rise to a due process "deprivation" was confined to one sentence offered in passing. *Id.* at 536-537.

That sentence was, moreover, unnecessary to the Court's holding that the prisoner received due process even if he was deprived of property. For a number of reasons, we believe it should be viewed only as a statement that the Court was assuming arguendo that the negligently-inflicted loss was a deprivation. We note that Justice Stewart, who joined in the Court's opinion, understood it in this way. See 451 U.S. at 544-545. Justice Powell, who concurred separately, likewise observed that the Court had "passe[d] over [the] threshold question—whether a negligent act by a state official that results in loss of or damage to property constitutes a deprivation of property for due process purposes." *Id.* at 547 (footnote omitted).

Furthermore, the conclusion that a negligent action can constitute a deprivation is, as the court of appeals noted and as we explain below (pages 24-26, *infra*), difficult to reconcile with several of this Court's previous decisions—*Paul*, *Martinez*, and *Baker* v. *McCollan*, 443 U.S. 137 (1979). It seems unlikely that the Court intended to depart from the direction marked out by those cases in brief dictum unsupported by any reasoning. Thus, several courts of appeals, like the court below, have read *Parratt* as leaving the question open and have declined to hold that a negligent act that results in a loss of liberty or property is a "deprivation" for purposes of due process.[7] We therefore believe that it is appropriate

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[7] See, *e.g.*, *Rankin* v. *City of Wichita Falls*, 762 F.2d 444, 447-448 (5th Cir. 1985); *Jackson* v. *City of Joliet*, 715 F.2d 1200, 1203-1206 (7th Cir. 1983); *Hull* v. *City of Duncanville*, 678 F.2d 582 (5th Cir. 1982); *Mills* v. *Smith*, 656 F.2d 337, 340 n.2 (8th Cir. 1981). See also *Daniels* v. *Williams*, 748 F.2d 229, 231-232

to address anew the question whether the negligent act of a state official can give rise to a potentially actionable "deprivation" of liberty or property under the Due Process Clause.

2. Section 1 of the Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As Justice Powell noted in his concurring opinion in *Parratt*, the most natural reading of the language "nor shall any State deprive" would limit it to deliberate actions by state officials calculated to take away life, liberty, or property from an individual. "[A] 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." 451 U.S. at 548 (footnote omitted). See *id.* at 548 n.4, quoting *Webster's New International Dictionary of the English Language* (2d ed. 1945).[8]

(4th Cir. 1984) (en banc), cert. granted, No. 84-5872 (Feb. 26, 1985) (negligent injury to the person, unlike negligent injury to property, does not constitute a deprivation of a protected interest) (alternative holding); *Wise* v. *Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981) (an act by a state officer will give rise to liability under Section 1983 only if it is "grossly disproportionate * * * and * * * inspired by malice rather than merely carelessness") (dictum); *Rittenhouse* v. *DeKalb County*, 764 F.2d 1451, 1459 (11th Cir. 1985) (Pittman, J., concurring).

[8] This reading of the Fourteenth Amendment draws support from the Court's holdings that the Equal Protection Clause is violated only by intentional acts. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Equal Protection and Due Process Clauses are contiguous in the Constitution and are grammatically parallel; there is no reason to interpret the Due Process Clause to reach negligent acts when the Equal Protection Clause does not. Moreover, the Due Process Clause of the Fifth Amendment imposes on the federal government restraints equivalent to those imposed on the states by the Equal Protection Clause (see, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 94-95 n.1 (1979)); petitioner's interpretation of due process would re-

3. More fundamentally, petitioner's contention that negligent actions can constitute a "deprivation" within the meaning of the Due Process Clause is based on a misunderstanding both of the role of procedural due process—upon which petitioner's claim purports to be grounded [9]—and of the relationship between the Due Process Clause and the common law of torts. Historically, the guarantee of due process of law has been applied only to deliberate decisions by government officials to deprive a person of life, liberty or property. Negligent injuries, even when inflicted by government employees, are the province of the law of torts, not of procedural due process.[10]

a. The Due Process Clause is " 'intended to secure the individual from the arbitrary exercise of the powers of government' " (*Hurtado* v. *California*, 110 U.S. 516, 527 (1884), quoting *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)). See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). When government officials

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quire that the single word "deprive" in the Fifth Amendment be interpreted to reach only intentional acts on some occasions—when the equal protection component of the Amendment is invoked—but to reach negligent acts when the procedural component of the Due Process Clause is at issue. Cf. *Logan*, 455 U.S. at 438 (Blackmun, J., dissenting) (implicitly rejecting the proposition that "anyone * * * who is injured by a random act of governmental misconduct" has "been deprived of equal protection.") Similarly, only intentional and authorized state action can amount to a "taking" within the meaning of the Fifth Amendment's Takings Clause.

[9] Petitioner maintains that his claim involves "procedural due process, pure and simple" (Pet. Br. 14); he expressly disavows any reliance on the substantive component of the Due Process Clause (*id.* at 16; see *id.* at 24-25). But see pages 26-28, *infra*.

[10] The district court concluded that while respondents' actions were negligent, respondents "did not act with deliberate or callous indifference" (J.A. 89). The court of appeals agreed (*id.* at 102). This case accordingly does not present the question—discussed in a portion of the court of appeals' opinion that was not joined by a majority of the court (*id.* at 118)—whether a reckless act that injures a liberty or property interest can constitute a "deprivation."

deliberately decide to deprive an individual of liberty or property, they "exercise • • • the powers of government" directly against that individual. But when a government official inflicts a negligent injury, the "powers of government" have been brought to bear against the individual in a far more oblique and less threatening fashion. Cf. O. Holmes, *The Common Law* 3 (1881).

Inadvertent injuries inflicted by the government may implicate other significant interests; the enactment of tort claims statutes, for example, reflects the view that injuries caused by negligence generally should be redressed. But to view the Due Process Clause as a protection against inadvertent government action is to trivialize its historic role. See *Parratt*, 451 U.S. at 545 (Stewart, J., concurring). The guarantee of due process, "perhaps the most majestic concept in our whole constitutional system" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring)), is intended to prevent governmental power from being "used for purposes of oppression" (*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). See, *e.g.*, *Chambers* v. *Florida*, 309 U.S. 227, 236-241 (1940); *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889). It is deliberate action by the government or its agents, not negligent action or inadvertence, that creates a threat of oppression or tyranny.

b. Throughout its history, the guarantee of due process of law has been directed to government actions that deliberately deprived individuals of life, liberty, or property. This Court has explained the derivation of the Due Process Clause as follows (*Twining* v. *New Jersey*, 211 U.S. 78, 100 (1908)):

> [T]he proposition universally accepted by American courts on the authority of Coke, [is] that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor

> shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

This language from the Magna Carta obviously was designed to forestall oppression through deliberate acts of government.

As this prohibition has evolved, it has continued to refer to deliberate acts. The phrase "due process of law" has been traced to 28 Edw. 3, ch. 3, which provides:

> No man of what state or condition he be, shall be out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law.

Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911). See *Ingraham* v. *Wright*, 430 U.S. 651, 673 n.41 (1977). The earliest state cases interpreting the phrase "due process of law" similarly were concerned with the procedures by which deprivations of liberty or property were deliberately imposed on individuals. See, *e.g.*, *Zylstra* v. *Charleston*, 1 Bay 382, 384 (S.C. 1794) (fine imposed by court without jury); Corwin, 24 Harv. L. Rev. at 372-373.

This Court had little occasion to construe the Due Process Clause before the Civil War. See *Davidson* v. *New Orleans*, 96 U.S. 97, 103-104 (1877). The few cases that came before it, however, also concerned only deliberate deprivations of liberty or property. See, *e.g.*, *Murray's Lessee* (distress warrants for summary collection of tax liability). It appears, therefore, that the drafters of the Fourteenth Amendment would have had no reason to believe that the guarantee of due process of law applied to anything other than deliberate deprivations of liberty or property.

Until recent decades, this Court's procedural due process cases generally concerned the procedures that were to be followed in criminal enforcement proceedings or in civil suits leading to the entry of judgment by a court. See, *e.g.*, *Mullane* v. *Central Hanover Bank &*

Trust Co., 339 U.S. 306 (1950); Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1267-1268 (1975). More recently, the Court has specified the procedures that must be followed in other kinds of proceedings leading to a deprivation of liberty or property. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971). See generally *Logan*, 455 U.S. at 430-431 and cases cited. In some instances, it has permitted process to be provided after the deprivation has occurred. See, *e.g.*, *Ingraham*, 430 U.S. at 674-682; *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908). But while these "proceedings" often are informal—they might involve, for example, no more than a decision made by a single low-level government employee whose primary responsibility is not the adjudication of claims (see, *e.g.*, *Ingraham*; *Goss* v. *Lopez*, 419 U.S. 565 (1975))—the Court's rulings have applied the guarantee of procedural due process in the way envisioned at the time of the Magna Carta: to define the procedures the government must follow when its agents deliberately impose a loss of liberty or property on a person.

C. The Due Process Clause Guarantees Procedural Regularity Rather Than A Remedy For Every Injury

1. That the Court never had found a negligent due process "deprivation" prior to *Parratt* was not accidental: it followed directly from the purposes served by procedural due process. As matters now stand, of course, the Due Process Clause does not deny a state the right to deprive persons of property or liberty, so long as it provides due process prior to (or, in some situations, soon after) the deprivation. See *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978). And the state, unless it acts in a wholly arbitrary way (see *Martinez*, 444 U.S. at 282), is responsible for setting the substantive criteria that, if met, will justify a deprivation": [11] it is the state that, for example, determines what circumstances permit the suspension of a driver's license (see *Bell* v. *Burson*,

402 U.S. 535, 541 (1971)), or what actions will lead to a suspension from school (see *Goss* v. *Lopez*, 419 U.S. 565, 573-574 (1975)), or what facts must be shown to support the seizure of property from a prison cell (see *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; see also *id.* at 3 (O'Connor, J., concurring)). See generally *Logan*, 455 U.S. at 433; *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 11-12 (1978).

The role of procedural due process in this regime historically has been to guarantee that a person threatened with (or suffering from) a deprivation receives an "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1924). See *Mullane*, 339 U.S. at 313. This opportunity serves to forestall arbitrary state action and " 'minimize[s] substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests," *Carey*, 435 U.S. at 259-260, quoting *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972); adequate process helps assure that the state will take into account the factors that it has deemed relevant to the deprivation.

Process, however, "is not an end in itself" (*Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983); see *Codd* v. *Velger*, 429 U.S. 624 (1977)), and a person denied due process cannot recover more than nominal damages unless he is able to show that adequate process would have affected the state's decision. *Carey*, 435 U.S. at 260.[12] And "minimization" of error does not mean elimination of error: the Due Process Clause does not require the state to reach a correct decision, or to apply its criteria

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[11] This power, of course, is the flip side of the state's ability to create property interests by, for example, providing that certain categories of persons are eligible for welfare benefits, or that certain actions give rise to civil liability. See, *e.g.*, *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 13, quoting *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Logan*, 455 U.S. at 432-433.

[12] Due process does, of course, have a substantive component; that point is discussed below (at 26-28).

properly. If, for example, the Georgia Department of Public Safety had given motorist Bell a proper hearing, but had suspended his license because it erroneously had concluded on the facts before it that he was a dangerous driver (cf. *Bell*, 402 U.S. at 539-543), the federal courts would not have stepped in to correct the error. See *Martinez*, 444 U.S. at 284-285 & n.9; *Baker* v. *McCollan*, 443 U.S. 137 (1979). The Clause thus guarantees only an opportunity to be heard, and to have a claim of right fairly judged.

2. As described above, procedural due process forestalls oppression or misuse of authority by forcing those who would work a deprivation to take the relevant factors into account; as understood to this point, application of the Clause presupposes knowing or systematic state conduct. Petitioner, however, envisions an entirely different role for procedural due process.

That petitioner's suit does not present a traditional due process claim is demonstrated by the relief he seeks. He does not ask for a hearing to show that the state improperly applied its stated criteria,[13] or contend that the state's statutory tort limitation should be declared unconstitutional (see J.A. 121). Instead, he complains only that he has suffered an injury that can be traced to the state's

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[13] To be sure, petitioner presumably would contend that the state has made negligence wrongful, so that the state violates its own standards when it acts negligently. But the concepts of procedural regularity and reasoned decisionmaking—which are at the heart of the Due Process Clause—have no application to negligent action. The state simply has committed an error; petitioner is no more entitled to compensation than would be the hypothetical motorist in the example discussed in text. Indeed, now that New Jersey has changed its common law rules to make petitioner's injury non-remediable, it is doubtful that respondents' actions can be characterized as legal wrongs. See *Logan*, 455 U.S. at 433 (an immunity defense, like any other element of a tort claim, may be viewed as an aspect of the state's definition of the claim); *Martinez*, 444 U.S. at 282 n.5 (same). Cf. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877).

error. He argues that the Due Process Clause makes that error unconstitutional, despite the state's lack of awareness that it was causing injury, because the state has refused to correct its mistake. He therefore insists that the guarantee of *procedural* due process accords him something more than procedural regularity on the part of the state: in his view, it grants him a *substantive* right to recover damages for his injury in federal court. In essence, then, his assertion is that the Clause directs the courts to fashion a federal law of torts—but to do so interstitially, to cover fortuitous gaps in state tort law.[14]

3. We therefore return to our initial objection to petitioner's claim: that it distorts the Due Process Clause by importing into it the values and principles of tort law. This Court's repeated holdings indicate that the Due Process Clause is designed to ensure procedural regularity, and thus serves purposes distinct from the purposes of the common law of torts. Notions borrowed from the law of torts are therefore not to be incorporated wholesale into the Due Process Clause.

In *Baker*, for example, the plaintiff was arrested by a sheriff pursuant to a warrant and held for several days until it was discovered that he was not the person sought. He brought suit under Section 1983, claiming that his rights under the Due Process Clause of the Fourteenth Amendment had been violated. The court of appeals upheld his claim, relying on the elements of the tort of

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[14] The district court, whose judgment petitioner is defending, accepted petitioner's invitation to fashion such a tort law; the court itself judged the merits of petitioner's negligence claim and awarded him compensation. Had petitioner's claim been a traditional one for the deprivation of procedural due process, however, the court simply would have directed the state to provide petitioner with proper procedural protections. Compare *Logan*, 455 U.S. at 434. And the court could not, in any event, have awarded damages without determining that petitioner would have prevailed under an adequate state post-deprivation process. See *Carey*, 435 U.S. at 260.

false imprisonment (see 443 U.S. at 142, 146) and reasoning that the sheriff " 'ha[d] a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant' " (*McCollan* v. *Tate*, 575 F.2d 509, 513 (5th Cir. 1978), quoted at 443 U.S. at 146). This Court reversed, emphatically stating that the court of appeals had erred in equating tort law wrongs with violations of the Due Process Clause.

The Court acknowledged that the plaintiff's detention may well have been wrongful under state tort law (443 U.S. at 142). But the Court held that due process had been accorded, because the state's procedures complied with constitutional requirements. That the procedures had been applied negligently did not give rise to a constitutional wrong: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles." 443 U.S. at 146.[15]

In *Paul*, the Court applied the same principle to another aspect of the Clause. It there ruled that an individual's "interest in reputation"—an interest that has long been protected by the common law—"is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." 424 U.S. at 712. The Court reasoned that to treat all interests protected by the common law as "liberty" or "property" "would seem almost necessarily to result in every legally cognizable

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[15] The Court has used an analogous analysis in the Eighth Amendment context, holding that a prisoner's claim of medical mistreatment states a constitutional violation only if it involves "deliberate indifference to serious medical needs" (*Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)); "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *Id.* at 105. The "proper forum" for the latter type of claim is state court. *Id.* at 107. See J.A. 120 n.9.

injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of the Amendment to learn that it worked such a result * * *." 424 U.S. at 699. If, as *Paul* held, a court is not to ascertain the content of "liberty" or "property" by referring to the interests protected by the common law, there is no reason for it to define "deprivation" by reference to common law concepts of fault such as negligence.

That this is so is demonstrated by *Martinez*. In that case, the survivors of a person killed by a parolee brought suit under Section 1983 against state officials who were responsible for the parolee's release. They alleged that the parole decision was "not only * * * negligent, but also * * * reckless, willful, wanton and malicious" (444 U.S. at 280 (footnote omitted)) and that it deprived the decedent of life without due process of law. The Court unanimously ruled that the plaintiffs had failed to state a claim because the official acts alleged did not constitute a "deprivation" within the meaning of the Due Process Clause. It found the injury "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law," since "it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute" (*id.* at 285). The Court thus stated its legal conclusion as follows (*ibid.*; citations omitted):

> Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to the [the] victim or to have proximately caused her death, we hold that * * * [the official defendants] did not "deprive" [the] decedent of life within the meaning of the Fourteenth Amendment.

In short, the Court, in interpreting the word "deprive," unanimously rejected the contention that a plaintiff who has proven a causal connection between an official act

and his injury sufficient to establish "causation" according to the law of torts has thereby shown a "deprivation." Petitioner's argument here cannot be squared with that conclusion.[16]

D. Petitioner's Claim Is Grounded On Substantive, Rather Than Procedural, Due Process

The discussion above suggests that petitioner's claim rests on concepts that are foreign to the traditional notion of procedural due process. But there is an additional reason for petitioner's inability to reconcile his contention with this Court's due process decisions, which goes beyond the ahistorical and illogical nature of his argument: in our view, petitioner's claim is not a procedural one at all.

As noted above, procedural due process claims relate to the procedures that must accompany—and that make permissible—deprivations of life, liberty, or property. But it is nonsensical to talk about petitioner's claim in those terms, because he is complaining about the sort of "action[] governmental officials may not take no matter what procedural protections accompany [it]." *Hudson*, slip op. 2 n.4 (Stevens, J., concurring in part and dissenting in part). See *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring). A state official could not have inflicted the injuries that petitioner suffered (or caused him to be injured by another inmate) on any showing under the most rigorous procedures; doing so would violate the prescriptions imposed by the Eighth Amendment or by

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[16] Petitioner attempts to distinguish *Martinez* by reading the Court's opinion as holding that "had proximate cause been established between the parole board's negligence and the death of the victim, § 1983 would provide a remedy" (Pet. Br. 20). As we note in text, however, the Court expressly found it irrelevant that the parole board might, as a matter of tort law, have proximately caused the victim's death. Petitioner also attributes special significance to the duty of care owed by a prison official to a prisoner (Pet. Br. 9-10). Yet in *Baker* the Court found no due process violation despite the sheriff-defendant's negligent violation of his duty to use due care. See pages 24-25, *supra*.

the *substantive* component of the Due Process Clause. See, *e.g.*, *Williams* v. *Mussomelli*, 722 F.2d 1130 (3d Cir. 1983); *King* v. *Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1968). Cf. *Rochin* v. *California*, 342 U.S. 165 (1952). Petitioner's claim cannot be that he received inadequate process, because no process would have justified the state's infliction of the injury that occurred here.[17]

Petitioner's claim therefore must be grounded on substantive due process. And as such, it cannot prevail. Petitioner himself appears to disavow any contention that the state's action infringed substantive constitutional standards, and it is in any event plain that the simple negligence he alleges does not involve a deliberate infliction of serious injury, or conduct that "is so otherwise offensive to 'the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), as to warrant * * * finding" a substantive due process violation. *Baker*, 443 U.S. at 147 (Blackmun, J., concurring); see *id.* at 148; *Rochin*, 342 U.S. at 172, 173; *Gumz* v. *Morrissette*, No. 84-3124 (7th Cir. Sept. 5, 1985), slip op. 7-12.

This conclusion points up the basic anomaly in petitioner's position. By insisting that every injury to person or property gives rise to a procedural due process claim (so long as it is not remediable in a state tort suit), he is attempting to convert an implausible substantive suit into a live procedural one. In the process, he is distorting the meaning of the Clause as a whole. Procedural due process is designed to assure regularity in the conscious decisionmaking processes of government; substantive due process stands as a bar to conduct that is

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[17] Petitioner insists that he challenges not the particular acts of respondents but the state's failure to create a tort remedy (Pet. Br. 16-17). If this is so, however, one might question why he brought suit against individual state officers who plainly had no responsibility for enacting the immunity statute at issue. See *Parratt*, 451 U.S. at 550-551 n.8 (Powell, J., concurring in the result).

inconsistent with the "decencies of civilized conduct." *Rochin*, 342 U.S. at 175. Petitioner, however, would have procedural due process swallow its substantive counterpart and guarantee the injured an opportunity to remedy every wrong. However "admirable" this goal might be in "the best of all possible worlds" (*Parratt*, 451 U.S. at 531), it is not one that the Due Process Clause was designed to achieve.

II. EVEN IF PETITIONER WAS "DEPRIVED" OF LIBERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE, HE WAS ACCORDED DUE PROCESS

Even granting petitioner all of the dubious premises discussed above—that his claim is one grounded on procedural due process, that negligent acts can give rise to constitutional "deprivations," and that he in fact suffered a deprivation of "liberty"—he still has not made out a constitutional violation. He must, in addition, demonstrate that he has not received adequate process.

A. Petitioner insists that he could not have been granted due process because the New Jersey tort scheme makes it impossible for him to obtain a damages award on his claim (Pet. Br. 22). But it never has been the law that a state violates the Due Process Clause whenever it employs substantive or procedural rules that preclude persons from obtaining relief for certain injuries caused by state actors. The Court has indicated, for example, that states may "erect reasonable procedural requirements for triggering the right to an adjudication," such as statutes of limitations or filing fees. *Logan*, 455 U.S. at 437.[18] And in *Martinez*, the Court rejected the

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[18] Procedural barriers of this sort may, of course, effectively deny plaintiffs who were injured by the state any opportunity to obtain relief—for reasons largely or wholly beyond the plaintiffs' control. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 124 (1979); *United States* v. *Kras*, 409 U.S. 434 (1973); *id.* at 455 (Stewart, J., dissenting).

claim that an immunity statute very similar to the one at issue here denied the plaintiffs due process, explaining that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." 444 U.S. at 282.[19]

In determining whether a particular litigation rule is consistent with due process, then, it is not enough to find (as petitioner suggests) simply that the rule has the effect of denying plaintiffs relief; instead, the state may deny an individual access to the courts when "the balance of state and private interests favors the government scheme." *Logan*, 455 U.S. at 430 n.5. The inquiry required by this principle—which essentially goes to the question whether the procedural system as a whole is fundamentally fair—thus parallels the analysis used in traditional due process cases to determine whether a given procedural provision provides adequate protection against the risk of erroneous deprivations. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). In this case, determining whether due process has been accorded therefore requires an inquiry into the magnitude of petitioner's private interests in maintaining his suit (which presumably includes consideration of the availability of a suit against the prisoner who injured him, see J.A. 92, 126) as measured against the interests served by the state immunity statute. Cf. *Martinez*, 444 U.S. at 282-283. Judge Garth engaged in just such an analysis below, and concluded that here the balance must be "struck in favor of the state" (J.A. 126).

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[19] Of course, state law cannot immunize a state official from liability in a Section 1983 suit if the official is found to have committed a *substantive* constitutional violation, as the Court noted in *Martinez*. See 444 U.S. at 284 n.8. But that is not the contention here. The question in this case is whether a tort system that makes use of official immunities should, for that reason alone, be deemed to accord inadequate *procedural* due process.

B. As repeated decisions of this Court demonstrate, a procedural system cannot be deemed either arbitrary or fundamentally unfair simply because it makes use of statutes or common law rules that create official immunities. Such rules serve important purposes that benefit society as a whole; this Court has long recognized the importance of the principle that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties" (*Barr*, 360 U.S. at 571 (plurality opinion)).

Official immunities, for example, forestall the danger that the prospect of liability will disable government officers from "execut[ing] [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974). And it spares officials from a flood of frivolous or retaliatory lawsuits. See, *e.g.*, *Economou*, 438 U.S. at 509-510. Identical interests are served by statutes, such as the New Jersey law at issue here, that preclude claims against officials grounded on certain types of injuries. See *Martinez*, 444 U.S. at 282-283 & n.6. Petitioner therefore cannot prevail on his claim that, because he is unable to obtain compensation from respondents, the New Jersey tort system necessarily denies him due process.[20]

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[20] If petitioner is correct in his assertion that he has made out a deprivation of liberty—and if the process here is inadequate because it offers him no remedy—he will have succeeded in sweeping away virtually all sovereign or official immunities, for intentional as well as negligent official conduct. And he will have done more than that: he will have called into question the constitutionality of all rules that create substantive limitations on liability, at least insofar as they apply to actions of government officials. Indeed, acceptance even of petitioner's underlying premise—that he has been deprived of liberty by respondents' negligence—would subject immunity rules (and other rules limiting liability) to a balancing analysis of the sort discussed in text. This result in itself would require a novel and extraordinarily far-reaching participation by federal judges in the design of state liability schemes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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